

[Code of Federal Regulations]  
[Title 36, Volume 2]  
[Revised as of July 1, 2003]  
From the U.S. Government Printing Office via GPO Access  
[CITE: 36CFR251]

[Page 315-326]

TITLE 36--PARKS, FORESTS, AND PUBLIC PROPERTY

CHAPTER II--FOREST SERVICE, DEPARTMENT OF AGRICULTURE

PART 251--LAND USES--Table of Contents

**Subpart C--Appeal of Decisions Relating to Occupancy and Use of National Forest System Lands**

Authority: 7 U.S.C. 5101-5106; 16 U.S.C. 472, 551.

Source: 54 FR 3362, Jan. 23, 1989, unless otherwise noted.

Sec. 251.80 Purpose and scope.

(a) This **subpart** provides a process by which those who hold or, in certain instances, those who apply for written authorizations to occupy and use National Forest System lands, may appeal a written decision by an authorized Forest Service line officer with regard to issuance, approval, or administration of the written instrument. The rules in the **subpart** establish who may appeal under these rules, the kinds of decisions that can and cannot be appealed, the responsibilities of parties to the appeal, and the various procedures and timeframes that will govern the conduct of appeals under this **subpart**.

(b) The rules in this **subpart** seek to offer appellants a fair and deliberate process for appealing and obtaining administrative review of decisions regarding written instruments that authorize the occupancy and use of National Forest System lands.

Sec. 251.81 Definitions and terminology.

For the purposes of this **subpart**, the following terms are defined:

**Appeal.** A request to a higher ranking officer for relief from a written decision filed under this **subpart** by an applicant for or a holder of a written instrument issued or approved by a Forest Service line officer.

**Appeal decision.** The written decision rendered by the Reviewing Officer on an appeal for relief under this **subpart**. The use of this term is limited to the final decision of a Reviewing Officer and does not refer to a stay decision or to any other determinations or procedural orders made on the conduct of an appeal (Sec. 251.99).

**Appeal record.** The documents submitted to the Reviewing Officer by an appellant, intervenor, or Deciding Officer (Sec. 251.98).

**Appellant.** An eligible applicant for or holder of a written instrument issued for the occupancy and use of National Forest System land (or their authorized agent or representative) who files an appeal pursuant to the provisions of this **subpart** (Sec. 251.86).

**Deciding officer.** The Forest Service line officer who makes a decision related to issuance, approval, or administration of an authorization to occupancy and use National Forest System lands that is appealed under this **subpart**.

Decisions regarding a written instrument or authorization to occupy

and use National Forest System lands. A broad, all inclusive phrase used throughout this **subpart** to connote the full range of actions and decisions a forest officer takes to issue written instruments, or to manage authorized uses of National Forest System lands, including, but not limited to, enforcement of terms and conditions, and suspension, cancellation, and/or termination of an authorization.

Forest Service line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this **subpart**. Specifically, for the purposes of this **subpart**, a Forest Service employee who holds one of the following offices and titles: District Ranger, Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

Intervenor. An individual who, or organization that, is an applicant for or holder of the written instrument, or a

[[Page 316]]

similar instrument, issued by the Forest Service that is the subject of an appeal, and who has an interest that could be affected by an appeal, and who has made a timely request to intervene in that appeal, and who has been granted intervenor status by the Reviewing Officer (Sec. 251.96).

Issuance of a written instrument of authorization. Applies both to decisions to grant and to deny a written instrument or authorization.

Notice of appeal. The document prepared and filed by an appellant to dispute a decision subject to review under this **subpart** (Sec. 251.90).

Oral presentation. An informal meeting (in person or by telephone) at which an appellant, intervenor, and/or Deciding Officer may present information related to an appeal to the Reviewing Officer (Sec. 251.97).

Parties to an appeal. The appellant(s), intervenor(s), and the Deciding Officer.

Responsive statement. A written document prepared by a Deciding Officer that responds to the notice of appeal record by an appellant (Sec. 251.94).

Reviewing Officer. The officer at the next administrative level above that of the Deciding Officer who conducts appeal proceedings, makes all necessary rulings regarding conduct of an appeal, and issues the appeal decision.

Written instrument or authorization. Any of those kinds of documents listed in Sec. 251.82 of this **subpart** issued or approved by the Forest Service authorizing an individual, organization or other entity to occupy and use National Forest System lands and resources.

[54 FR 3362, Jan. 23, 1989; 54 FR 13807, Apr. 5, 1989]

Sec. 251.82 Appealable decisions.

(a) The rules of this **subpart** govern appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of the following written instruments to occupy and use National Forest System lands, including but not limited to:

(1) Permits for ingress and egress to intermingled and adjacent private lands across National Forest System lands, 36 CFR 212.8 and 212.10.

(2) Permits and occupancy agreements on National Grasslands and other lands administered under the provisions of title III of Bankhead-Jones Farm Tenant Act issued under 36 CFR 213.3.

(3) Grazing and livestock use permits issued under 36 CFR part 222, **subpart A**.

- (4) Mining plans of operation under 36 CFR part 228, **subpart A**.
  - (5) Mining operating plans for the Sawtooth National Recreation Area issued under 36 CFR 292.17 and 292.18.
  - (6) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay and other similar materials) under 36 CFR 228, **subpart C**.
  - (7) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR part 251, **subpart A**.
  - (8) Special use authorizations issued under 36 CFR part 251, **subpart B**, except, as provided in Sec. 251.60(g), for suspension or termination of easements issued pursuant to 36 CFR 251.53(e) and (e)(1).
  - (9) Permits for uses in Wilderness Areas issued under 36 CFR 293.3.
  - (10) Permits to excavate and/or remove archaeological resources issued under the Archaeological Resources Protection Act 1979 and 36 CFR part 296.
  - (11) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.
  - (12) Decisions related to the standards for the use, subdivision, and development of privately owned property within the boundaries of the Sawtooth National Recreation Area pursuant to 36 CFR part 292, **subpart C**.
- (b) Written decisions on any of the matters of the type listed in paragraph (a) of this section issued by a Forest Service staff officer with delegated authority to act for a Forest Service line officer are considered to be decisions of the line officer.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989]

[[Page 317]]

#### Sec. 251.83 Decisions not appealable.

The following decisions are not appealable under this **subpart**:

- (a) Decisions appealable to the Agriculture Board of Contract Appeals, USDA, under 7 CFR part 24.
- (b) Decisions involving Freedom of Information Act denials under 7 CFR part 1 or Privacy Act determinations under 7 CFR 1.118.
- (c) Decisions for which the jurisdiction of another Government agency, the Comptroller General, or a court to hear and settle disputes supersedes that of the Department of Agriculture.
- (d) Recommendations of Forest Service line officers to higher ranking Forest Service line officers or to other entities having final authority to implement the recommendation in question.
- (e) Decisions appealable under separate administrative proceedings, including, but not limited to, those under 36 CFR 223.117 (Administration of Cooperative for Federal Sustained Yield Units); 7 CFR 21.104 (Eligibility for Recreation Payment of Amount); and 4 CFR part 21 (Bid Protests).
- (f) Decisions pursuant to Office of Management and Budget Circular A-76, Performance of Commercial Activities.
- (g) Decisions concerning contracts under the Federal Property and Administrative Services Act of 1949, as amended.
- (h) Decisions covered by the Contract Disputes Act.
- (i) Decisions involving Agency personnel matters.
- (j) Decisions where relief sought is reformation of a contract or award of monetary damages.
- (k) Decisions made during the preliminary planning process pursuant to 36 CFR part 219 and 40 CFR parts 1500-1508 that precede decisions to implement the proposed action.
- (l) Decisions related to National Forest land and resource

management plans and projects only reviewable under 36 CFR part 217.

(m) Decisions related to rehabilitation of National Forest System lands and recovery of forest resources resulting from natural disasters or other natural phenomena such as wildfires, severe wind, earthquakes, and flooding when the Regional Forester or, in situations of national significance, the Chief of the Forest Service determines and gives notice that good cause exists to exempt such decisions from appeal under this **subpart**.

(n) Decisions imposing penalties for archaeological violations under 36 CFR 296.15 or for violations of prohibitions and orders under 36 CFR part 261.

(o) Reaffirmation of prior decisions.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989]

#### Sec. 251.84 Obtaining notice.

(a) A Deciding Officer shall promptly give written notice of decisions subject to appeal under this **subpart** to applicants and holders defined in Sec. 251.86 of this **subpart** and to any holder of like instruments who has made a written request to be notified of a specific decision. The notice shall include a statement of the Deciding Officer's willingness to meet with applicants or holders to hear and discuss any concerns or issues related to the decision (Sec. 251.93). The notice shall also specify the name of the officer to whom an appeal of the decision may be filed, the address, and the deadline for filing an appeal.

(b) In States with Department of Agriculture certified mediation programs, a Deciding Officer shall also give written notice of the opportunity for the affected term grazing permit holder to request mediation of decisions to suspend or cancel term grazing permits, in whole or in part, pursuant to 36 CFR 222.4(a)(2)(i), (ii), (iv), (v) and (a)(3) through (a)(6). Such notice must inform the permit holder that, if mediation is desired, the permit holder must request mediation as part of the filing of an appeal.

[54 FR 3362, Jan. 23, 1989, as amended at 64 FR 37846, July 14, 1999]

#### Sec. 251.85 Election of appeal process.

(a) No decision can be appealed by the same person under both this **subpart** and part 217 of this chapter.

(b) Should a decision be reviewable under this **subpart** as well as part 217 of this chapter, a party who qualifies to bring an appeal under this **subpart** can elect which process to use for obtaining review of a decision, but in so doing, the appellant thereby forfeits all right to appeal the same decision under the

[[Page 318]]

other review process. However, a holder who waives the right to appeal under the provisions of 36 CFR part 217 may intervene pursuant to 36 CFR 217.6(b).

#### Sec. 251.86 Parties.

Only the following may participate in the appeals process provided under this **subpart**:

(a) An applicant who, in response to a prospectus or written solicitation or other notice by the Forest Service, files a formal written request for a written authorization to occupy and use National

Forest System land covered under Sec. 251.82 of this **subpart** and

- (1) Was denied the authorization, or
  - (2) Was offered an authorization subject to terms and conditions that the applicant finds unreasonable or impracticable.
- (b) The signatory(ies) or holder(s) of a written authorization to occupy and use National Forest System land covered under Sec. 251.82 of this **subpart** who seeks relief from a written decision related to that authorization.
- (c) An intervenor as defined in Sec. 251.81 of this **subpart**.
- (d) The Deciding Officer who made the decision being appealed under this **subpart**.

#### Sec. 251.87 Levels of appeal.

(a) Decisions made by the Chief. If the Chief of the Forest Service is the Deciding Officer, the appeal is to the Secretary of Agriculture. Review by the Secretary is discretionary. Within 15 calendar days of receipt of a timely notice of appeal, the Secretary shall determine whether or not to review the decision. If the Secretary has not decided to review the Chief's decision by the expiration of the 15-day period, the requester(s) shall be notified by the Secretary's office that the Chief's decision is the final administrative decision of the Department of Agriculture. When the Secretary elects to review an initial decision made by the Chief, the Secretary shall conduct the review in accordance with the first level appeal procedures outlined in this rule.

(b) Decisions made By Forest Supervisors and Regional Foresters. Only one level of appeal is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available appeal are as follows:

- (1) If the decision is made by a Forest Supervisor, the appeal is filed with the Regional Forester;
  - (2) If the decision is made by a Regional Forester, the appeal is filed with the Chief of the Forest Service.
- (c) Decisions made by the District Ranger. Two levels of appeal are available for written decisions by District Rangers.

- (1) The appeal for initial review is filed with the Forest Supervisor.
- (2) The appeal for a second level of review is filed with the Regional Forester within 15 days of the first level appeal decision. Upon receiving such a request, the Regional Forester shall promptly request the first level file from the Forest Supervisor. The review shall be conducted on the existing record and no additional information shall be added to the file.

(d) Discretionary review of dismissal decisions. Dismissal decisions rendered by Forest Service line officers pursuant to this part (Sec. 251.92) are subject to only one level of discretionary review (Sec. 251.100) as follows:

- (1) If the Reviewing Officer was the Forest Supervisor, the Regional Forester has discretion to review.
- (2) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.
- (3) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

- (e) Discretionary review of appeal decisions. Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to only one level of discretionary review as follows:
- (1) If the Reviewing Officer is the Regional Forester, the Chief of the Forest Service has discretion to review.
  - (2) If the Reviewing Officer is Chief, the Secretary of Agriculture has discretion to review.
  - (3) A Regional Forester's decision on a second-level appeal

constitutes the final administrative determination of the Department of Agriculture on the

[[Page 319]]

appeal and is not subject to further review by a higher level officer under this **subpart**.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989]

#### Sec. 251.88 Filing procedures.

(a) Filing procedures. In order to appeal a decision under this **subpart**, an appellant must:

(1) File a notice of appeal in accordance with Sec. 251.90 of this **subpart** with the next higher line officer as identified in Sec. 251.87.

(2) File the notice of appeal within 45 days of the date on the notice of the written decision being appealed (Sec. 251.84); and

(3) Simultaneously send a copy of the notice of appeal to the Deciding Officer.

(b) Evidence of timely filing. It is the responsibility of those filing an appeal to file the notice of appeal by the end of the filing period. In the event of questions, legible postmarks will be considered evidence of timely filing. Where postmarks are illegible, the Reviewing Officer shall rule on the timeliness of the notice of appeal. Untimely submissions are subject to dismissal as provided for in Sec. 251.92(a)(2).

(c) Computation of time period for filing. (1) The time period for filing a notice of appeal of a decision under this **subpart** begins on the first day after the Deciding Officer's written notice of the decision. All other time periods applicable to this **subpart** also will be computed to begin on the first day following an event or action related to the appeal.

(2) Time periods applicable to this **subpart** are computed using calendar days. Saturdays, Sundays, or Federal holidays are included in computing the time allowed for filing an appeal; however, when the filing period would expire on a Saturday, Sunday, or Federal holiday the filing time is extended to the end of the next Federal working day.

#### Sec. 251.89 Time extensions.

(a) Filing of notice of appeal. Time for filing a notice of appeal is not extendable.

(b) All other time periods. Appellants, Intervenors, Deciding Officers, and Reviewing Officers shall meet the time periods specified in the rules of this **subpart**, unless a Reviewing Officer has extended the time as provided in this paragraph. Except as noted in paragraph (a) of this section and as prohibited at the discretionary review level (Sec. 251.100), the Reviewing Officer may extend all other time periods under this **subpart**.

(1) For appeals of initial written decisions by the Chief, a Regional Forester, or a Forest Supervisor, a Reviewing Officer, where good cause exists, may grant a written request for extension of time to file a responsive statement or replies thereto. The Reviewing Officer shall rule on requests for extensions within 10 days of receipt of the request and shall provide written notice of the extension ruling to all parties to the appeal.

(2) Except for discretionary reviews of appeal decisions as provided in Sec. 251.100 of this **subpart**, a Reviewing Officer may extend the time period for issuance of the appeal decision, including for purposes of allowing additional time for the Deciding Officer to resolve disputed

issues, as provided in Sec. 251.93 of this **subpart**.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989]

#### Sec. 251.90 Content of notice of appeal.

(a) It is the responsibility of an appellant to provide a Reviewing Officer sufficient narrative evidence and argument to show why a decision by a lower level officer should be reversed or changed.

(b) An appellant must include the following information in a notice of appeal:

(1) The appellant's name, mailing address, and daytime telephone number;

(2) The title or type of written instrument involved, the date of application for or issuance of the written instrument, and the name of the responsible Forest Service Officer;

(3) A brief description and the date of the written decision being appealed;

(4) A statement of how the appellant is adversely affected by the decision being appealed;

(5) A statement of the facts of the dispute and the issue(s) raised by the appeal;

[[Page 320]]

(6) Specific references to any law, regulation, or policy that the appellant believes to be violated and the reason for such an allegation.

(7) A statement as to whether and how the appellant has tried to resolve the issue(s) being appealed with the Deciding Officer, the date of any discussion, and the outcome of that meeting or contact; and

(8) A statement of the relief the appellant seeks.

(c) An appellant may also include one or more of the following in a notice of appeal: a request for oral presentation (Sec. 251.97); a request for stay of implementation of the decision pending decision on the appeal (Sec. 251.91); or, in those States with a Department of Agriculture certified mediation program, a request for mediation of grazing permit cancellation or suspensions pursuant to Sec. 251.103.

[54 FR 3362, Jan. 23, 1989; 54 FR 13807, Apr. 5, 1989, as amended at 54 FR 34510, Aug. 21, 1989; 64 FR 37846, July 14, 1999]

#### Sec. 251.91 Stays.

(a) A decision may be implemented during the appeal process, unless the Reviewing Officer grants a stay or unless a term grazing permit holder appeals a decision and simultaneously requests mediation pursuant to Sec. 251.103. In the case of mediation requests, a stay is granted automatically upon receipt of the notice of appeal for the duration of the mediation period as provided in Sec. 251.103.

(b) An appellant or intervenor may request a stay of a decision at any time while an appeal is pending, if the harmful effects alleged pursuant to paragraph (c)(3) of this section would occur during pendency of the appeal. The Reviewing Officer shall not accept any request to stay implementation of a decision that is not scheduled to begin during pendency of the appeal.

(c) To request a stay of decision, an appellant or intervenor must--

(1) File a written request with the Reviewing Officer;

(2) Simultaneously send a copy of the stay request to any other appellant(s), to intervenor(s), and to the Deciding Officer.

(3) Provide a written justification of the need for a stay, which at a minimum includes the following:

(i) A description of the specific project(s), activity(ies), or action(s) to be stopped.

(ii) Specific reasons why the stay should be granted in sufficient detail to permit the Reviewing Officer to evaluate and rule upon the stay request, including at a minimum:

(A) The specific adverse effect(s) upon the requester;

(B) Harmful site-specific impacts or effects on resources in the area affected by the activity(ies) to be stopped, and

(C) How the cited effects and impacts would prevent a meaningful decision on the merits.

(d) A Deciding Officer and other parties to an appeal may provide the Reviewing Officer with a written response to a stay request. A copy of any response must be sent to all parties to the appeal.

(e) Timeframe. The Reviewing Officer must rule on a stay request no later than 10 calendar days from receipt.

(f) Criteria to consider. In deciding a stay request, a Reviewing Officer shall consider:

(1) Information provided by the requester pursuant to paragraph (c) of this section including the validity of any claim of adverse effect on the requester;

(2) The effect that granting a stay would have on preserving a meaningful appeal on the merits;

(3) Any information provided by the Deciding Officer or other party to the appeal in response to the stay request; and

(4) Any other factors the Reviewing Officer considers relevant to the decision.

(g) Notice of decision on a stay request. A Reviewing Officer must issue a written decision on a stay request.

(1) If a stay is granted, the stay shall specify the specific activities to be stopped, duration of the stay, and reasons for granting the stay.

(2) If a stay is denied in whole or in part, the decision shall specify the reasons for the denial.

[[Page 321]]

(3) A copy of a decision on a stay request shall be sent to all parties to the appeal.

(h) Duration. A stay shall remain in effect for the 15-day period for determining discretionary review (Sec. 251.100), unless changed by the Reviewing Officer in accordance with paragraph (i) of this section.

(i) Change in a stay. A Reviewing Officer may change a stay decision in accordance with any terms established in the stay decision itself or at any time during pendency of an appeal that circumstances support a change of stay. In making any changes to a stay decision, the Reviewing Officer must issue a written notice to all parties to the appeal explaining the reason for making the changes and setting forth any terms or conditions that apply to the change.

(j) Petitions to change a stay. An appellant or intervenor may petition a Reviewing Officer to change or lift a stay at any time during the pendency of an appeal. Such petitions must be in writing, must explain how circumstances have changed since the stay was imposed, and must state why the change in the stay is being requested. The petitioner must send a copy of the petition to all parties to the appeal.

(k) Appeal of stay decision or changes in stay. A Reviewing Officer's decision to grant, deny, lift, or otherwise change a stay is not subject to further appeal and review, except when the first-level Reviewing Officer was the Forest Supervisor. In this instance, the Regional Forester has discretion to review.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989; 64



FR 37846, July 14, 1999]

Sec. 251.92 Dismissal.

(a) The Reviewing Officer shall dismiss an appeal and close the record without a decision on the merits when:

(1) The appellant is not eligible to appeal a decision under this **subpart**.

(2) Appellant's notice of appeal is not filed within the required time period, or the notice of appeal fails to meet the minimum requirements of Sec. 251.90 of this **subpart** to such an extent that the Reviewing Officer lacks adequate information on which to base a decision.

(3) In cases where there is only one appellant, the appellant withdraws the appeal.

(4) The requested relief cannot be granted under existing law, fact, or regulation.

(5) The decision is excluded from appeal under this **subpart** (Sec. 251.83).

(6) The Deciding Officer has withdrawn the decision under appeal.

(7) A request for review of the same decision has been filed by the same person under part 217 of this chapter.

(8) A mediated agreement is reached (Sec. 251.103).

(b) The Reviewing Officer shall give written notice of dismissal that includes an explanation of why the appeal is dismissed.

(c) A Reviewing Officer's dismissal decision is subject to discretionary review at the next administrative level as provided for in Sec. 251.87(d), except when a dismissal decision results from withdrawal of an appeal by an appellant, withdrawal of the initial decision by the Deciding Officer, or a mediated resolution of the dispute.

[54 FR 3362, Jan. 23, 1989, as amended at 55 FR 7896, Mar. 6, 1990; 64 FR 37846, July 14, 1999]

Sec. 251.93 Resolution of issues.

(a) Authorized Forest Service officers shall, to the extent practicable and consistent with the public interest, consult and meet in person, or by phone, with holders of written instruments prior to issuing written decisions related to administration of a written authorization. The purpose of such meetings is to discuss any issues or concerns related to the authorized use and to reach a common understanding and agreement where possible prior to issuance of a written decision.

(b) When decisions are appealed, the Deciding Officer may discuss the appeal with the appellant(s) and intervenor(s) together or separately to narrow issues, agree on facts, and explore opportunities to resolve the issues by means other than review and decision on the appeal, including mediation pursuant to Sec. 251.103. At the request of the Deciding Officer, the Reviewing Officer may extend the time period to allow

[[Page 322]]

for meaningful negotiations, except for appeals under review at the discretionary level. In the event of mediation of a grazing dispute under Sec. 251.103, the Reviewing Officer may extend the time for mediation only as provided in Sec. 251.103.

(c) The Deciding Officer has the authority to withdraw a decision, in whole or in part, during the appeal. Where a Deciding Officer decides to withdraw a decision, all parties to the appeal and the Reviewing

Officer must receive written notice.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989; 64 FR 37846, July 14, 1999]

#### Sec. 251.94 Responsive statement.

(a) Content. A responsive statement contains the Deciding Officer's response to the specific facts or issues of law or regulation and the requested relief set forth by the appellant in the notice of appeal.

(b) Timeframe. Unless the Reviewing Officer has granted an extension or dismissed the appeal, or unless mediation has been requested under this **subpart**, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of receipt of the notice of appeal. Where mediation occurs but fails to resolve the issues, the Deciding Officer shall prepare a responsive statement and send it to the Reviewing Officer and all parties to the appeal within 30 days of the reinstatement of the appeal timeframes (Sec. 251.103(c)).

(c) Replies. Within 20 days of the postmarked date of the responsive statement, the appellant(s) and any intervenor(s) may file a written reply to the responsive statement with the Reviewing Officer. Appellants and intervenors must send a copy of any reply to a responsive statement to all parties to the appeal, including the Deciding Officer.

[54 FR 3362, Jan. 23, 1989, as amended at 64 FR 37846, July 14, 1999]

#### Sec. 251.95 Authority of reviewing officer.

(a) Discretion to establish procedures. A Reviewing Officer may issue such procedural orders as deemed appropriate to ensure orderly, expeditious, and fair conduct of an appeal providing they are consistent with other provisions of this part.

(1) In appeals involving intervenors, the Reviewing Officer may prescribe special procedures to conduct the appeal.

(2) All parties to an appeal shall receive notice of any orders or decisions on the conduct of the appeal.

(3) Orders and determinations governing the conduct of an appeal are not subject to appeal and further review.

(b) Consolidation of appeals. A Reviewing Officer may consolidate multiple appeals of the same decision, or of similar decisions involving common issues of fact or law and issue one appeal decision. Similarly, a Reviewing Officer may issue one decision in cases involving separate reviews filed pursuant to 36 CFR part 217 and under this part when the decision at issue is the same decision. In such case, the Reviewing Officer shall give notice to all parties to multiple appeals.

(1) A decision to consolidate appeals is not subject to appeal and further review.

(2) At the discretion of the Reviewing Officer, the Deciding Officer may prepare one responsive statement to multiple appeals.

(c) Requests for additional information. Except in discretionary review conducted pursuant to Sec. 251.100 and second level appeals of decisions made by the District Ranger pursuant to Sec. 251.87(c) of this **subpart**, the Reviewing Officer may ask any party to an appeal for additional information as deemed necessary to decide the appeal. Such requests will be limited to obtaining and evaluating information needed to clarify issues raised. The Reviewing Officer shall notify all parties of the request for information, provide it to all parties, give opportunity to comment, and extend time periods if necessary to allow for submission of the information.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989; 55 FR 7896, Mar. 6, 1990]

#### Sec. 251.96 Intervention.

(a) A request to intervene in an appeal may be made at any time prior to the closing of the appeal record

[[Page 323]]

(Sec. 251.98) at the first level of appeal (Sec. 251.87). Requests to intervene in an appeal at the discretionary review level (Sec. 251.87(d)) shall be denied.

(b) To request intervention in a first-level appeal under this **subpart**, a party, at a minimum, must:

- (1) Submit a written petition to intervene to the Reviewing Officer,
- (2) Be, as defined at Sec. 251.81 of this **subpart**, an applicant for or holder of a written instrument issued by the Forest Service that is the subject of or affected by the appeal, and have an interest that could be directly affected by a decision on the appeal, and
- (3) Show, in the request for intervention, how the decision on the appeal would directly affect petitioner's interests.

(c) The Reviewing Officer determines whether a party requesting intervention meets the requirements of paragraph (a) of this section. In granting intervention, the Reviewing Officer must give notice to all other parties to the appeal.

(d) A granting or denial of intervention is not subject to appeal to a higher level.

(e) Appellants and intervenors must concurrently furnish copies of all submissions to each other as well as the Deciding Officer. Failure to provide each other copies may result in removal of a submission from the appeal record. At the discretion of the Reviewing Officer, appellants may be given additional time to review and comment on initial submissions by intervenors.

(f) An intervenor cannot continue an appeal if the appellant withdraws the appeal.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989]

#### Sec. 251.97 Oral presentation.

(a) Purpose. An oral presentation provides an additional opportunity for an appellant, and other parties to an appeal, to present their viewpoints to the Reviewing Officer. The purpose is to restate, emphasize, and/or clarify information related to an appeal. Oral presentations are to be conducted in an informal manner and shall not be subject to formal rules of procedure such as those applicable to judicial proceedings.

(b) Requests. Only an appellant may request and be granted an oral presentation. An appellant may request an oral presentation at any time prior to closing of the appeal record (Sec. 251.98). A Reviewing Officer shall automatically grant an oral presentation if the appellant requested the presentation as part of the notice of appeal.

(c) Participation. At the discretion of the Reviewing Officer, oral presentations may be open to public attendance, but participation is limited to parties to the appeal. The Reviewing Officer shall advise all parties to the appeal, including the Deciding Officer, of the place, time, and date of the oral presentation, and how the oral presentation will be conducted. All parties to an appeal shall be invited to participate. Appellants and intervenors must bear any expense involved in making an oral presentation in person or by telephone.

(d) Limitation. Oral presentations shall be held only at the first level of appeal (Sec. 251.87(b)).

#### Sec. 251.98 Appeal record.

The following rules apply only to the appeal record for appeals at the first level (Sec. 251.87 (a), (b)):

(a) It is the responsibility of the Reviewing Officer to maintain in one location the documents related to the appeal.

(b) The record consists of the documents filed with the Reviewing Officer including, but not limited to, the notice of appeal, responsive statement, replies to submissions by various parties to the appeal, orders and determinations made on the conduct of the appeal, and correspondence.

(c) The Reviewing Officer has discretion to remove from the record documents that were not sent to all parties to an appeal.

(d) Unless the Reviewing Officer has ordered otherwise, the appeal record closes with the expiration of the time period for filing of the reply(ies) to the responsive statement, or at the conclusion of an oral presentation, if there is one. The Reviewing Officer shall notify all parties to an appeal of the closure of the record.

(e) The appeal record is open to public inspection.

[[Page 324]]

(f) In appeals involving initial decisions of the Chief (Sec. 251.87(a)), the establishment of an administrative record as defined in paragraph (a) of this section shall not begin unless the Secretary elects to review the appeal. Except for the initial notice of appeal, any filings made previous to the Secretary's election to review will not be accepted.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989]

#### Sec. 251.99 Appeal decision.

(a) The Reviewing Officer shall base the appeal decision on the appeal record and applicable laws, regulations, orders, policies, and procedures.

(b) The Reviewing Officer shall affirm or reverse the original decision whole or in part and include the reason(s) for the decision. The Reviewing Officer may also include in the appeal decision instructions for further action by the Deciding Officer.

(c) At the first level of appeal, the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is closed.

(d) At the second level of appeal provided in Sec. 251.87(c), the Reviewing Officer shall make and issue an appeal decision within 30 days of the date the record is received from the first level Reviewing Officer.

(e) The Reviewing Officer shall send a copy of all appeal decisions to all participants.

(f) Unless the next higher officer exercises the discretion to review an appeal decision as provided in Secs. 251.87(e) and 251.100 of this **subpart**, the appeal decision is the final administrative decision of the Department of Agriculture and is not subject to further review under this **subpart** or part 217 of this chapter.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989]

#### Sec. 251.100 Discretionary review.

(a) Petitions or requests for discretionary review shall not, in and of themselves, give rise to a decision to exercise discretionary review. In electing to exercise discretion, a Reviewing Officer should consider, but is not limited to, such factors as controversy surrounding the decision, the potential for litigation, and whether the appeal decision is precedential in nature or establishes new policy.

(b) As provided for in Secs. 251.87(d) and (e), 251.91(k), and 251.92, stay decisions rendered by a Forest Supervisor, certain dismissal decisions rendered by Forest Service line officers, and first-level appeal decisions rendered by Regional Foresters and the Chief (Sec. 251.99), are subject to discretionary review at the next highest administrative level. Within one day following the date of a decision subject to such discretionary review, the Reviewing Officer shall forward a copy of the decision and the initial decision upon which the appeal is predicated to the next higher officer.

(c) The next higher level officer shall have 15 calendar days from date of receipt to decide whether or not to review an appeal decision and may call for or use the appeal record in deciding whether or not to review the appeal decision. If the record is requested, the 15-day period is suspended at that point. The lower level Reviewing Officer shall forward it within 5 days of the request. Upon receipt, the higher level officer shall have 15 days to decide whether or not to review the lower level decision. If that officer takes no action by the expiration of the discretionary review period, appellants shall be notified by the discretionary level officer that the appeal decision of the Reviewing Officer stands as the final administrative review decision of the Department of Agriculture.

(d) When an official exercises the discretion in Sec. 251.87(d) or Sec. 251.87(e) of this **subpart** to review a dismissal or appeal decision, the discretionary review shall be made on the existing appeal record and the lower level Reviewing Officer's appeal decision. The record shall not be reopened to accept additional submissions from any source, including the Reviewing Officer whose appeal decision is being reviewed.

(e) When an official exercises discretion to review an appeal decision, a Reviewing Officer may extend a stay, in whole or in part, during pendency of the discretionary review.

(f) The second level Reviewing Officer shall conclude the review within 30 days of the date of notice issued to an

[[Page 325]]

appellant that the lower level decision will be reviewed.

(g) If a discretionary review decision is not issued by the end of the 30-day review period, appellants and intervenors shall be deemed to have exhausted their administrative remedies for purposes of judicial review. In such case, appellants, intervenors, and the lower level Reviewing Officer shall be notified by the discretionary level officer.

(h) The Reviewing Officer shall provide a copy of the decision to all appellants, intervenors, the Deciding Officer, and the lower level Reviewing Officer.

[54 FR 3362, Jan. 23, 1989, as amended at 54 FR 34510, Aug. 21, 1989; 55 FR 7896, Mar. 6, 1990]

Sec. 251.101 Policy in event of judicial proceedings.

It is the position of the Department of Agriculture that any filing for Federal judicial review of and relief from a decision appealable under this **subpart** is premature and inappropriate, unless the appellant has first sought to resolve the dispute by invoking and exhausting the

procedures of this **subpart**. This position may be waived only upon a written finding by the Chief.

Sec. 251.102 Applicability and effective date.

(a) Except where applicants or holders elect the decision review procedures of part 217 of this chapter, appealable decisions arising from the issuance, approval, and administration of written instruments authorizing occupancy and use of National Forest System lands made on or after February 22, 1989, shall be subject to the procedures of this part.

(b) Decisions made before February 22, 1989, arising from the issuance, approval, and administration of written instruments authorizing occupancy and use of National Forest System lands shall be subject to appeal under the provisions of 36 CFR 211.18.

[54 FR 6892, Feb. 15, 1989]

Sec. 251.103 Mediation of term grazing permit disputes.

(a) Decisions subject to mediation. In those States with Department of Agriculture certified mediation programs, any holder of a term grazing permit may request mediation, if a Deciding Officer issues a decision to suspend or cancel a term grazing permit, in whole or in part, as authorized by 36 CFR 222.4 (a)(2)(i), (ii), (iv), (v), and (a)(3) through (a)(6).

(b) Parties. Notwithstanding the provisions addressing parties to an appeal at Sec. 251.86, only the following may participate in mediation of term grazing permit disputes under this section:

(1) A mediator authorized to mediate under a Department of Agriculture State certified mediation program:

(2) The Deciding Officer who made the decision being mediated, or designee;

(3) The holder whose term grazing permit is the subject of the Deciding Officer's decision and who has requested mediation in the notice of appeal;

(4) The holder's creditors, if applicable; and

(5) Legal counsel, if applicable. The Forest Service will have legal counsel participate only if the permittee choose to have legal counsel.

(c) Timeframe. When an appellant simultaneously requests mediation at the time an appeal is filed (Sec. 251.84), the Reviewing Officer shall immediately notify, by certified mail, all parties to the appeal that, in order to allow for mediation, the appeal is suspended for 45 calendar days from the date of the Reviewing Officer's notice. If agreement has not been reached at the end of 45 calendar days, but it appears to the Deciding Officer that a mediated agreement may soon be reached, the Reviewing Officer may notify, by certified mail, all parties to the appeal that the period for mediation is extended for a period of up to 15 calendar days from the end of the 45-day appeal suspension period. If a mediated agreement cannot be reached under the specified timeframes, the Reviewing Officer shall immediately notify, by certified mail, all parties to the appeal that mediation was unsuccessful, that the stay granted during mediation is lifted, and that the timeframes and procedures applicable to an appeal (Sec. 251.89) are reinstated as of the date of such notice.

(d) Confidentiality. Mediation sessions shall be confidential; moreover, dispute

[[Page 326]]

resolution communications, as defined in 5 U.S.C. 571(5), shall be

confidential. However, the final agreement signed by the Forest Service official and the permit holder is subject to public disclosure.

(e) Records. Notes taken or factual material received during mediation sessions are not to be entered as part of the appeal record.

(f) Cost. The United States Government shall cover only incurred expenses of its own employees in mediation sessions.

(g) Exparte communication. Except to request a time extension or communicate the results of mediation pursuant to paragraph (d) of this section, the Deciding Officer, or designee, shall not discuss mediation and/or appeal matters with the Reviewing Officer.

[64 FR 37846, July 14, 1999]